# STATE OF MICHIGAN

# COURT OF APPEALS

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| DEBORAH NORRIS, f/k/a DEBORAH MUNNO,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 18, 2002 |
| v | No. 237087<br>Oakland Circuit Court<br>Family Division |
| ANTHONY JEROME MUNNO,<br><br>Defendant-Appellant. | LC No. 93-452994-DM |

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying his motion for a change in custody. We affirm.

Defendant first argues that the trial court erroneously concluded that he did not demonstrate proper cause to warrant review of the custody order, that the trial court erred in finding that a custodial environment was established with plaintiff, that the trial court erred in its application of the statutory best interest factors, and that, therefore, the trial court abused its discretion in denying defendant's motion to modify the custody order. We disagree.

In child custody proceedings, we review the trial court's findings of fact to determine whether they are contrary to the great weight of the evidence, and will affirm a trial court's factual determinations unless the record evidence "clearly preponderates in the opposite direction." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). The trial court's ultimate decision regarding custody, however, is a dispositional ruling that we review for an abuse of discretion. *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000).

A custody award may be modified only upon a showing of proper cause or change of circumstance that establishes that the modification is in the child's best interest, as determined by the factors set forth in MCL 722.23. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). The party seeking change must establish such cause or change in circumstance before the best interest factors may be considered. *Rossow v Aranda*, 206 Mich App 456, 457-458; 522 NW2d 874 (1994).

In this case, the trial court determined that defendant had not shown either proper cause or a change of circumstance warranting modification of the custody order. Although the trial

court's inquiry should have ended there, see *id*., the court went on to address the statutory best interest factors. While we conclude that it is at least arguable that defendant demonstrated proper cause,[1] which would require an analysis under the best interest factors, we further conclude that regardless of whether defendant demonstrated such cause, any error in the trial court's determination in this regard was harmless because defendant has failed to demonstrate that the evidence clearly preponderates in the opposite direction with regard to the court's findings concerning the statutory best interest factors. *Phillips*, *supra*; see also MCR 2.613(A) (reversal is not required unless the failure to do so would be "inconsistent with substantial justice").

Before making a determination regarding the best interest of a child, a trial court must determine if a custodial environment exists. *Mogle*, *supra* at 197. A custodial environment is established if:

> over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to the permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

"If the trial court finds that an established custodial environment exists, then the trial court can change custody only if the party bearing the burden presents clear and convincing evidence that the change serves the best interests of the child." *Foskett*, *supra* at 6. In the instant case, the trial court determined that an established custodial environment existed with plaintiff. We find no error in this conclusion as, contrary to defendant's assertion, the trial court's finding in this regard is not against the great weight of the evidence. As noted by the trial court, the evidence offered at the custody hearing indicated that plaintiff has been the child's primary custodian since 1993 and, although both parties have provided guidance, discipline and the necessities of life to the child since that time, plaintiff has done so on a daily basis since the child's birth.

Because the trial court's finding that an established custodial environment existed is supported by the evidence at the hearing, the trial court could change custody only if defendant presented clear and convincing evidence that the change would serve the best interests of the child. *Id*. In order to make this determination, the trial court analyzed the best interest factors enumerated under MCL 722.23 and set forth its findings on the record. See *Mixon v Mixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999).[2] For the majority of factors, the trial court either

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[1] Defendant testified regarding several of his concerns, including the child's behavioral problems at school and the fact that plaintiff had many men in her life, which defendant believed had an adverse effect on the child. Defendant also alleged that plaintiff's poor health affected her ability to adequately care for the child.

[2] Although the trial court stated no facts in support of its conclusions regarding the factors listed in MCL 722.23(e) and (i), we reject defendant's argument that this failure is legal error requiring reversal. As noted by this Court in *LaFleche v Ybarra*, 242 Mich App 692, 700; 619 NW2d 738 (2000), although the trial court must generally consider and explicitly state its findings and

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determined that the parties were equal or found in favor of plaintiff. Essentially, the trial court acknowledged plaintiff's daily presence in the child's life, plaintiff's participation (both curricular and extra-curricular) in the child's schooling, and the established nature of the relatively stable environment provided by plaintiff. After a careful review of the record, we are not convinced that the trial court's findings on these factors were against the great weight of the evidence. *Phillips*, *supra*. Although the record contains evidence in favor of both plaintiff and defendant on most of the challenged factors, we cannot say that the evidence clearly preponderates in the opposite direction of the trial court's conclusions. *Id*. We are similarly not convinced that defendant has shown by clear and convincing evidence that it is in the best interest of the child to change custody. MCL 722.27(1)(c). Accordingly, the trial court did not abuse its discretion in refusing to grant defendant custody. MCL 722.28; *Mogle*, *supra*.

Defendant next argues that the trial court erred by not allowing Judith Froemke, an employee of the friend of the court, to testify regarding her findings and reasoning in her recommendation to change custody to defendant. Again, we disagree. We review a trial court's evidentiary decision for an abuse of discretion. *Hilgendorf v Saint John Hosp & Medical Center Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

In *Truitt v Truitt*, 172 Mich App 38, 43; 431 NW2d 454 (1988), this Court explained that the trial court's custody decision must be based upon its own evidentiary hearing, rather than the friend of the court's hearing and conclusions:

> "[I]t is clear from the statute that the circuit court must, upon motion by either party, conduct a 'de novo hearing,' rather than simply provide de novo review. MCL 552.507(5)[ ]. . . . The distinction is one that has meaning and, in the context of trial, has been extensively discussed by this Court. . . . Where a trial de novo is required, the circuit court is required to proceed as if no 'prior determination had been made and arrive at an independent decision.' We hold that the de novo hearing guaranteed under MCL 552.507(5)[ ] . . . requires the circuit court, on motion of any party dissatisfied with a recommendation of the friend of the court, to conduct a hearing as if no friend of the court hearing had been conducted previously and arrive at an independent conclusion." [quoting *Marshall v Beal*, 158 Mich App 582, 591; 405 NW2d 101 (1986). (Citations omitted).]

We find that the trial court did not abuse its discretion by preventing Froemke from testifying regarding her conclusions and recommendations. The trial court was to conduct a de novo hearing. The trial court permitted Froemke to testify regarding her personal knowledge of the instant case. Further, defendant actually utilized this exact rule to prevent plaintiff's counsel from introducing evidence regarding the friend of the court referee's recommendation in this case. In accordance with the reasoning and analysis in *Truitt*, the trial court did not abuse its discretion by not allowing Froemke to testify as to her findings and the reasoning for her recommendation regarding custody of the child. See *id*.

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conclusions regarding each fact, the trial court need not comment on every matter in evidence or declare acceptance or rejection of every proposition argued.

Finally, defendant argues that the trial court erred in failing to "assess" against plaintiff a negative inference stemming from plaintiff's failure to produce her medical records during discovery. However, because there was sufficient other evidence presented at trial regarding plaintiff's health, we do not conclude that the trial court's error in this regard, if any, warrants relief. MCR 2.613(A).

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Hilda R. Gage